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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 410

ST. LOUIS AMUSEMENT COMPANY, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION; COLUMBIA BROADCASTING SYSTEM, INC., KWK, INCORPORATED, 220 TELEVISION INC., BROADCAST HOUSE, INC., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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September 1958

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St. Louis Amusement Company prays that a writ of certiorari issue to review the judgment entered in this case on July 8, 1958, by the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW.

The opinion of the Court of Appeals was filed on August 28, 1958, and is printed at Appendix page 1a, and Record page 47

JURISDICTION.

The judgment was entered July 8, 1958. The jurisdiction of this Court is based on section 402 (j) of the Communications Act of 1934, as amended (47 U.S.C.A. 402(j)), and section 1254 of the Judicial Code (28 U.S.C.A. 1254).

QUESTIONS PRESENTED FOR REVIEW.

Whether in passing on transfers of television authorizations under section 310(b) of the Communications Act, the Commission is required to refrain from consideration of the public interest, convenience and necessity.

Whether petitioner was a party in interest under section 309(c) of the Act, and entitled to make a protest against the approval by the Commission of acquisition by CBS of the television rights of station KWK-TV, and against approval of the transfer by CBS of the construction permit for a television station on channel 11 at St. Louis, and to have a public hearing on the subject.

STATUTES AND REGULATIONS INVOLVED.

Communications Act of 1934 as Amended (47 U.S.C.A.)

Section 309(c):

> When any instrument of authorization is granted by the Commission *without a hearing* as provided in subsection (a) hereof, such grant shall remain *subject to protest* as hereinafter provided *for* a period *of thirty days.* During such thirty day period *any party in interest may file a protest* under oath directed to such grant and *request a hearing* on said application so granted. Any protest so filed shall contain such allegations

of fact as will show the protestant to be a party in interest and shall specify with particularity the facts, matters and things relied upon, but shall not include issues or allegations phrased generally. The Commission shall, within thirty days from the date of the filing of such protest, *enter findings* as to whether such protest meets the foregoing requirements and if it so finds the application involved *shall be set for hearing* upon issues set forth in said protest, together with such further specific issues, if any, as may be prescribed by the Commission. In any hearing subsequently held upon such application all issues specified by the Commission shall be *tried in the same manner provided in subsection* (*b*) hereof, but with respect all issues set forth in the protest and not specifically adopted by the Commission, both the *burden of proceeding* with the introduction of evidence and the *burden of proof* shall be upon the *protestant*. The hearing and determination of cases arising under this subsection shall be expedited by the Commission and *pending hearing and decision the effective date of the Commission's action* to which protest is made *shall be postponed* to the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance or conduct of an existing service, in which event the Commission shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing.

Section 310(b):

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or dispoesd of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Com-

mission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

Rules and Regulations of the Federal Communications Commission.

Section 3,636:

Multiple ownership—(a) No license for a television broadcast station shall be granted to any party (including all parties under common control) if

(1) such party directly or indirectly owns, operates, or controls another television broadcast station which serves substantially the same area; or

(2) such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has an interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the extent of other competitive service to the areas in question. The Commission, however, will in any event con-

sider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers, or directors to have a direct or indirect interest in, or be stockholders, officers or directors of, more than seven television broadcast stations, nor more than five of which may be in the VHF band.

(b) Paragraph (a) of this section is not applicable to non-commercial educational stations. (18 Federal Register, pp. 7799-7800)

STATEMENT OF THE CASE.

The basis of the jurisdiction of the Court of Appeals is sections 309(e) and 405 of the Communications Act.

On October 23, 1957, the Communications Commission granted an application of Columbia Broadcasting System, Inc. (called CBS), for consent to the transfer to 220 Television, Inc. of a permit for the construction of a television station on channel 11 at St. Louis, which had been granted to CBS on March 27, 1957; and granted an application of KWK Incorporated for consent to a transfer by it to CBS of television station KWK-TV on channel 4 at St. Louis. Both transactions and applications were connected, and both transfers were approved by the Commission without a hearing.

St. Louis Amusement Company filed a protest against the approvals. Oppositions to the protest were filed by CBS, 220 Television and KWK Incorporated. (R. 436, 442, 447)

On December 2, 1957, the protest was dismissed without hearing, on the ground that St. Louis Amusement Company was not a party in interest.

The protest, the oppositions and the records of the Commission, showed the following facts:

On March 27, 1957, the Commission granted a permit for the channel 11 station at St. Louis to CBS. (R. 37-55) The facts stated relative to the original grant of the permit bear upon the question whether petitioner was a party in interest and had standing to make the protest against the later transactions.

There were four other applicants for the same permit: (1) petitioner, (2) St. Louis Telecast, Inc., (3) Broadcast House, Inc., (4) 220 Television. (R. 6) In the order granting the permit to CBS, the other applications were denied and dismissed. (R. 37-55)

The standard used by the Commission for selection of the grantee of the permit, was the past television broadcast record and experience of the applicants, the grant to be made to the applicant having the best record and experience. (R. 7)

This standard made the award to CBS almost certain. Petitioner was engaged in the motion picture theatre business in the St. Louis area, and was without any television experience. 220 Television was engaged in the hotel business, with no television experience. St. Louis Telecast had a limited non-television broadcast experience. Broadcast House had a very short television experience, which had ended in failure. (R. 24). In a decision approved by the Commission, the Hearing Examiner said, "as regards background and experience in broadcasting CBS is a giant among pygmies." At no stage of the proceedings was the gigantic superiority of CBS disputed by any of the other applicants.

The other applicants sought to have CBS disqualified, however, on the basis of the so-called multiple interest rule of the Commission, and because of its dominance and control in the broadcast industry. The multiple interest rule provided that no license for a television station should be granted to anyone if the grant would result in a concentration of control of television broadcasting inconsistent with public interest, convenience or necessity; and placed an absolute limit of five upon the number of stations in which one party should have an interest. The rule is printed at page 4.

CBS then owned interests in five stations, was an applicant to construct a sixth in Boston, and owned an interest in a corporation which was an applicant to construct another in Pennsylvania.[1]

Petitioner sought by motions to have the CBS disqualification determined and enforced at the beginning of the proceedings, to avoid a useless and expensive contest with CBS; but all of the motions were denied by the Commission.[2]

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[1] The stations in which CBS then owned interests were:

1—WCBS-TV at New York City
2—WBBM-TV at Chicago
3—KNXT at Los Angeles
4—WTOP-TV at Washington
5—WCCO-TV at Minneapolis

When it filed the applications for approval of the transfer of the construction permit and acquisition of KWK-TV, on September 26, 1957, CBS was also the licensee for five television stations.

[2] Expenditures and costs incurred by St. Louis Telecast and Broadcast House in prosecuting their applications are said to have amounted to $400,000. (R. 354)

An appeal by petitioner to the United States Court of Appeals for the District of Columbia, was dismissed as premature. Certiorari was denied by this Court on November 8, 1954.[3]

Petitioner considered any further effort to prevail over CBS in the Commission proceedings to be futile, and presented no evidence in the subsequent proceedings. Thirty-one months later, on March 27, 1957, the Commission granted the permit to CBS, and dismissed the applications of petitioner and the other applicants. (R. 28, 37-55) Commissioners McConnaughey, Craven, Doerfer and Mack concurred in the controlling decision. Commissioners Hyde, Lee and Bartley dissented. (R. 37)

From the grant to CBS, appeals were taken to the Court of Appeals by the other applicants, on the ground that CBS was disqualified by the multiple interest rule and its domination and control in the broadcast industry. Petitioner, considering that an appeal by it would be identical and cumulative with those of the other applicants, filed no appeal.

After receipt of the permit on March 27, 1957, CBS took virtually no action for construction of the station, and no facilities or business have ever existed for the proposed station. Instead, in about a month after the grant CBS began negotiations for acquisition of station KWK-TV and transfer of the construction permit to 220 Television. The negotiations culminaated in three contracts in September 1957. On September 25, 1957, CBS entered into a contract for transfer of

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[3] *St. Louis Amusement Co.* v. *FCC*, No. 12354, August 11, 1954; *St. Louis Amusement Co.* v. *U.S.*, No. 361, October Term 1954; 348 U.S. 876, 75 S.C. 112.

the permit to 220 Television as a gift, i.e., "without consideraiton". (R. 429) The contract required 220 Television to dismiss its own appeal from the grant to CBS, and to procure dismissal of the appeals of St. Louis Telecast and Broadcast House. On September 20, 1957, 220 Television had contracted with Telecast and Broadcast House for the dismissals, for delivery to and equal division between them of $400,000 of debentures, to be issued for the purpose by 220 Television. The debentures matured in four years and bore 3 percent interest per annum. (R. 353) The appeals were dismissed on September 26, 1957.

On September 25, 1957, CBS entered into a contract with KWK Incorporated for the acquisition of the license and facilities of television station KWK, which had long been operating on channel 4 at St. Louis. The price to be paid was $2,440,000. (R. 428)

On September 26, 1957, CBS filed an application for consent to the transfer of the construction permit; and KWK filed an application for consent to the transfer of its property and authorizations to CBS. On October 23, 1957, both transactions were approved by the Commission in a decision by Commissioners Hyde, Doerfer and Mack. (R. 424, 428, 429)

Commissioner Bartley dissented on the KWK acquisition, and voted for a full hearing, saying, "I dissent and vote for a 309(b) letter,[1] in view of transferee's multiple interest holdings, to determine whether or not the proposed stations will be operated in combination with other commonly-owned stations

[1] A 309(b) letter is a notice for a full hearing on the question whether the transaction will serve the public interest, convenience and necessity. (Section 309(b) Communications Act.)

of transferee, or whether it otherwise violates the multiple ownership rules." (R. 429)

On October 30, 1957, petitioner filed a protest against the approvals, and requested a public hearing and denial of the applications. (R. 430) Petitioner claimed that it was a party in interest and entitled to maintain the protest, because (1) it was engaged in business in St. Louis; (2) had been an applicant for the construction permit in the original proceedings in which it was awarded to CBS; (3) upon denial of consent to acquire KWK-TV and to transfer the construction permit, the only lawful disposition which could be made of the permit would be to return it to the Commission; (4) in proceedings which would thereafter be had for another grant of the permit, petitioner would have a legal right to procure a grant of the permit; (5) a grant of the permit to petitioner would enable it to engage in the broadcasting business and to earn profits and other economic benefits accruing therefrom; (6) approval of the transactions would deprive petitioner of such legal right and economic benefits. (R. 430-436, 461-462).

The protest was dismissed without hearing on the ground that petitioner had no standing to make it, and that the transactions against which it protested were not contrary to the public interest. The decision was made by Commissioners Doerfer, Bartley, Craven, Ford and Mack. (R. 451)

The Commission found, also as a basis for the dismissal, that (1) petitioner had unsuccessfully questioned the qualification of CBS to receive the permit in the original proceedings; (2) the Court of Appeals had dismissed its appeal as premature, and this Court

had denied certiorari; and (4) the Commission hearing examiner had held petitioner in default. (R. 451-465)

The Court of Appeals decided that petitioner had no standing to protest the transfer of the construction permit by CBS, and no standing to appeal; that the Communications Act allows the grantee of a permit to transfer it to whom he pleases; and that the Commission may consider only whether a transferee is "qualified". The opinion makes no reference to the acquisition by CBS of station KWK-TV.

ARGUMENT.

THE COURT OF APPEALS MISCONSTRUED THE STATUTE TO EXCLUDE CONSIDERATION OF THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY IN TRANSFER CASES

The major premise of the decision of the Court of Appeals was that in passing on an application for consent to the assignment of a construction permit, the Communications Act requires the Commission to consider only whether the assignee is "qualified". The statement in the opinion is:

> The Commission, relying on the legislative history, contends that under section 310(b), as amended in 1952, when a construction permittee seeks to assign its permit, the Commission is empowered to consider only whether the assignee selected by the permittee is qualified; and that the Commission has no power to consider the comparative qualifications of prior unsuccessful applicants, even when, as in this case, the assignment follows close on the heels of a comparative hearing. If the Commission's present interpretation is correct, the 1952 amendment operates to allow a private entity to decide who shall receive the permit, without regard to which one of these

applicants the Commission has selected on a comparative basis.

> Whether Congress intended this result, or even anticipated the possibility, is not clear from the legislative history. This interpretation of the 1952 amendment could conceivably open the door to something not unlike the "trafficking in licenses" long since disapproved. If this interpretation is correct, there may be a serious gap in the statutory scheme to which Congressional attention should be directed. It is difficult to rationalize a sound justification for payment of $400,000 by the assignee of the original permittee to the two unsuccessful applicants for abandoning their appeals to this court. The Commission should (if it does not under the existing statute) have power to inquire into the possible impact of these payments on the public interest. The considerations which lead courts to encourage settlement of private litigation do not apply undiluted to "settlement" of appeal from the Commission, having in mind the important public interest factors dealt with. (R. App. 1a)

The meaning of "qualified" as used by the Court, is not made entirely clear. Nothing as to its content or criteria is found in the opinion. The language of the Court makes clear, however, that no requirement for consideration of the public interest is included. This is true, we think, because in addition to language to that effect, the Court cites two material features of the transfer by CBS to 220 Television, to which it almost literally ascribes a bad effect on the public interest, and which it expressly excludes as subjects permissible for consideration by the Commission. The transfer is almost literally called a trafficking in licenses; and the payment of $400,000 for preventing a decision by the Court of Appeals on the legality of the

original grant to CBS, is almost literally said to be obnoxious to the public interest. Moreover, the trafficking and $400,000 payments are parts of the transaction, as distinguished from any attribute of the assignee. In other words, the opinion means it is the transaction, and not the character of 220 Television which affects the public interest.

The interpretation that section 310(b) prevents the Commission from inquiring into the possible impact of the trafficking, the payments or any other element of the transactions on the public interest, is erroneous. The words of the section are so unmistakably to the contrary as to leave no room for construction. The words are, "No construction permit . . . shall be transferred . . . except . . . upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."

The section adds that the application for approval "shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question . . ." Section 308 provides that the Commission may grant construction permits only upon written application; and section 309 adds the requirement that applications shall be granted upon finding that public interest, convenience and necessity will be served. Indeed, it is elementary that the controlling principle of the Act for grants, approvals or consents by the Commission is that they shall serve the public interest.

The contention of the Commission, affirmed by the Court of Appeals, that the legislative history of section 310(b) shows a requirement for exclusion of consideration of the public interest in passing on transfers, is not correct.

The section became law in 1952, as an amendment of the same section in the preceding Communications Act of 1934. (86 Stat. 716; 47 USC section 310(b); 48 Stat. 1086). In the 1934 Act the section provided that a station license should not be transferred unless the Commission decided that the transfer was in the public interest.

While the 1934 section 310(b) was law (1934-1952), the Commission provided by Rule 1.321 that when an application was filed for consent to assignment of a construction permit, notice of the assignment should be published, and that persons desiring to purchase the permit on the same terms and conditions, might file competing applications with the Commission. It was provided that the Commission should determine which of any competing applicants was the best qualified to operate the station "in the public interest", and then enter an order stating that its consent would be given to an assignment to that applicant if the licensee would make an assignment to that applicant. (Warner, *Radio and Television Law*, section 55b et seq.)

The 1952 amendment prohibited the procedure under this rule for competitive applicants, comparison of their qualifications and consent to an assignment to the best qualified. But it clearly repeated and emphasized the requirement that any proposed and approved transfer should serve the public interest. The 1952 section 310(b) is printed at page 3.

The Congressional committee reports on the legislation support the above statement. The Senate Report states that the purpose of the amendment was to make definite the procedure for passing on transfer applications, and to annul that part of the procedure

for inviting and considering competing applications, called the Avco procedure. The Report adds that the requirement of public interest is not changed.

> It should be emphasized that the Commission's authority to see to it that stations are operated in the public interest and to determine whether the proposed transferee possesses the qualifications of an original licensee or permittee is not impaired or affected in any degree by this subsection. In fact, the latter requirement is expressly stated. (Senate Report No. 44, 82d Cong., 1st Sess., January 25, 1951; Pike & Fischer, *Radio Regulation*, Vol. 1, pp. 10:271, 10:280)

The House Report is merely a paraphrase of the text of the proposed subsection. (House Report No. 1750, 82d Cong., 2d Sess., April 8, 1952; Pike & Fischer, ibid., pp. 10:301, 10:311)

THE COURT OF APPEALS ERRONEOUSLY DECIDED THAT PETITIONER SOUGHT A COMPARISON OF APPLICANTS IN THE PROTEST PROCEEDINGS

The second branch of the Commission's interpretation of section 310(b), likewise affirmed by the Court of Appeals, that in transfer cases the Commission is denied power to consider the comparative qualifications of applicants, never has been, and is not now, disputed by petitioner. Instead, petitioner has been in full agreement with this interpretation.

The Court's statement of the Commission's interpretation, as applied to this case, is "that the Commission has no power to consider the comparative qualifications of prior unsuccessful applicants, even when, as in this case, the assignment follows close on the heels of a comparative hearing." Petitioner has also been in full agreement with this application of the

section. It has not claimed the right to have the Commission compare its qualifications with those of 220 Television, because it was an unsuccessful applicant for the original grant, or because the transfer to 220 Television followed shortly after the original grant, or because it deemed the original grant to CBS to be invalid, or for any other reason at all. Petitioner has not claimed that the Commission should have made such a comparison, on the theory that it has a discretion to do so if it wishes. On the contrary, petitioner understands that the statute absolutely forbids any such comparison.

Accordingly, petitioner in its protest made no allegations to the effect that it should have been selected as the assignees, or that it or anyone else was superior, equal or inferior in any qualifications to 220 Television. Instead, the protest and appeal made entirely clear that the objection was not based on the fact or theory that the public interest might be served at all, or as well or better, by a transfer to it or to any other person than 220 Television.

The statement in the opinion of the Court that petitioner in its protest "demanded that the comparative hearing be re-opened and a new permittee selected" is incomplete and misleading. Petitioner has never even suggested that the selection of a new permittee be considered or made in the protest proceedings. In the Memorandum and Order of the Commission denying the protest, no assertion is made to the effect that petitioner requested such consideration and selection, or any comparison with 220 Television. (R. 451-465)

To show the effect upon petitioner of approval of the transaction for transfer of the permit to 220 Tele-

vision, and that it was a "party in interest", petitioner alleged in the protest and contended in the Court of Appeals, that it had been an applicant and found to be qualified in the proceedings for the original grant; that the grant to CBS was fundamentally unlawful; that the validity of the grant had been under attack in the Court of Appeals; that the dismissal of the appeals, as part of the transfer transactions, was made to prevent and had prevented a determination of the validity of the grant; that the Court might have decided that the grant was invalid; in which event the case would have been returned to the Commission, probably for elimination of CBS as an applicant, and for selection by the Commission, in a continuation of the former proceedings or in new proceedings, of a new grantee from among the former applicants or from among them and others; and that the effect of this would have been to enable petitioner (1) to enjoy in those proceedings an opportunity to procure the permit under the lawful conditions for which it had contended; and (2) to serve the public interest in the television broadcast business and to procure the profits and other economic benefits which would be derived therefrom. (R. 435, 436)

Petitioner also alleged and contended that, apart from the dismissal of the appeals from the original grant, the character, incidents and effect of the transfer of the permit and acquisition of KWK-TV—the domination and elimination of competition at St. Louis by CBS, the $400,000 payments for purchase of opposition, the private exercise of the authority and function of the Commission—were all against the public interest; and that the effect on petitioner of approval by the Commission, would be to deprive petitioner

of the right and opportunity (to be exercised in non-protest proceedings), to procure the permit for itself and to earn the profits and other benefits to be derived from a television business.

It is clear, therefore, that the protest and appeal unmistakeably differentiated and separated the proceedings on the protest from probable later proceedings which would occur if, and only if, consent to the transactions should be denied and the permit were returned to the Commission; and that any comparison should occur only in the latter proceedings.

The fact that the ultimate objective of petitioner, was to procure an opportunity to realize its lawful right to get a construction permit for the same station, by first inducing the Commission to deny approval of the transfer to 220 Television, to retake the permit, and thus to make it available for grant in different and later proceedings in which qualifications of applicants would be compared, did not bring petitioner's protest within the prohibition of section 310(b) against comparison of applicants.

In *Granik & Cook* v. *FCC*, 234 F. 2d 782, 1956, the Court upheld a protest similarly motivated. There the protester had an option from an owner to buy his radio station and license. Notwithstanding the option, however, the owner made an assignment to another party, and applied to the Commission for approval. The option holder protested against approval because of his option, his object being to defeat the assignment so that he could procure the station and license by exercise of the option. The denial of the protest by the Commission was reversed.

THE ACQUISITION OF KWK-TV AND THE TRANSFER OF THE CONSTRUCTION PERMIT WERE CONTRARY TO THE PUBLIC INTEREST

The acquisition by CBS of KWK-TV and the gift by CBS of the construction permit to 220 Television, were clear manifestations and uses of the dominant power of CBS in the broadcast industry, which disserved the public interest. The acquisition and gift were a long step forward in the CBS progress to greater dominance and monopoly. The importance of a hearing on the subject of dominancy by CBS was the ground of dissent by Commissioner Bartley to approval of the transactions. (R. 428-429)

KWK-TV had the valuable network program service of CBS for the St. Louis area, under a contract with CBS which provided for taking it away for use by CBS upon operation of a CBS station at St. Louis. For KWK, therefore, the appearance of CBS in St. Louis meant the loss of the valuable network ingredient of its business, and became the reason for sale and delivery of its property and business to CBS and departure by it from the industry. The disservice to the public was (1) in the surrender and sale by KWK to dominating power, and (2) the loss by the St. Louis community of local and independent ownership.

Whereas the construction permit was granted to CBS because of the superlative broadcast service to be furnished by it, by the largess of CBS the permit was almost immediately passed on to a donee altogether without any broadcast experience and ability at all. The prospect for financial success and good public broadcast service by 220 Television is not favorable; for it has rushed in against the formidable competition and power of CBS where KWK-TV feared to

stay; seriously handicapped, moreover, by exclusion from a network program service, and by a non-public service debt of almost $450,000, paid for silencing the objections of two unsuccessful applicants.

In *Clarksburg Publishing Co.* v. *FCC*, 225 F. 2d 511, 1955, the Court held that where an applicant before the Commission bought out the opposition of a competing applicant for $14,390, ostensibly as reimbursement for expenses in prosecuting the application, a public interest question was involved. The Court said:

> In certain instances, the Commission has undertaken to insure that no consideration other than "out-of-pocket expenses" has been paid the dismissed applicant. Where mutually exclusive applications have been designated for hearing and one is dismissed, the Commission has, in recent cases, directed its hearing examiner to consider the relevant facts regarding the dismissal of the competing application." (p. 520)

The Court added that "evidence along these lines is indispensable to the Commission's conclusion that all is well." (p. 520)

The dominancy of CBS and the legality of the action of the Commission in increasing that dominancy by the grant of the construction permit, was the subject matter of the appeals pending in the Court of Appeals. The dismissal of those appeals was not the settlement of a *private* law suit, but was the stifiement by private parties and the Commission, of the decision of matters affected with great public interest. A decision in those cases would have settled grave issues concerning the diffusion of broadcast rights, the prevention of undue concentration and the conduct of the Commission in

the administration of the Communications Act. Forestalling such a decision was a distinct disservice to the public interest. Payment of a large sum of money to preclude a decision, and approval of the payment by the Commission to clear the way for its a proval of the proposed transactions, was great aggravation of the public injury.

In *National Broadcasting Co.* v. *FCC*, 132 F. 2d 544, 547, 1942, the Court said, "radio broadcasting is not exclusively a matter of business or financial gain, and that it is the public interest, not the private right, which is primarily at stake upon the appeal."

The acquisition of KWK and the gift of the permit for the new station, amounted to a re-distribution by CBS of the television broadcasting rights, business and service of two of the four stations at St. Louis. It effected a radical change of ownership, broadcast experience and public service in the business for the St. Louis area. The ownership of KWK, which had made a favorable record of long public service, and which was selected for the broadcast license by the Commission, gave place to CBS, which was not selected by the Commission. 220 Television, which is totally devoid of broadcast experience, and was not selected by the Commission, became the holder of the channel 11 permit in place of CBS, which was selected by the Commission on the basis of its high superiority.

The CBS assignment to 220 Television was an exercise of the authority and duty of the Commission by CBS, to select the grantee of the permit, in disservice to the public interest. The time between the original grant and the transfer by CBS was short. CBS had not constructed anything, and it had not established

any broadcasting business. The transfer therefore was not incidental to the transfer of any facilities and business for making use of the permit. Nothing was tranferred but the naked right to construct.

The construction permit was in no sense property belonging to CBS. In *FCC* v. *Sanders*, 309 U.S. 470, 475, this Court said, "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license." In the circumstances of this case, the permit and the right to select another grantee, therefore, belonged exclusively to the Commission; and the return of the permit to the Commission was the only lawful disposition thereof which could have been made by CBS.

The Commission made no findings or determination as to the effect of the transactions on the public interest. As we have shown, the Court of Appeals declined to consider the public interest.

PETITIONER WAS A PARTY IN INTEREST

The Communications Act provides that where an instrument of authorization has been granted by the Commission without a hearing, any "party in interest" may file a protest against the authorization and procure a hearing, and if upon hearing of the protest it shall appear that the authorization will not serve the public interest, it should be denied. (Section 309(c).)

Authority to acquire KWK-TV and transfer the construction permit, having been granted without hearing, petitioner filed a protest alleging it was a party in interest and that the transactions were contrary to the public interest, and requested a public

hearing and denial of the authority. (R. 430-436) Petitioner claimed that it was a party in interest because (1) it was engaged in business in St. Louis; (2) had been an applicant for the construction permit in the original proceedings in which it was awarded to CBS; (3) upon denial of consent to acquire KWK-TV and to transfer the construction permit, the only lawful disposition which could be made of the permit would be to return it to the Commission; (4) in proceedings which would thereafter be had for another grant of the permit, petitioner would have a legal right to procure a grant of the permit; (5) a grant of the permit to petitioner would enable it to engage in the broadcasting business and to earn profits and other economic benefits accruing therefrom; (6) approval of the transactions would deprive petitioner of such legal right and economic benefits. (R. 430-436)

The Act does not define or indicate the qualifications of a party in interest. Nor is it indicated in what way, if at all, a protester shall be affected by the action against which he protests, to have the necessary interest.

The reported cases decide that a protester is a party in interest where there is a likelihood that he will suffer economic injury or competitive injury from the protested action. They do not, however, limit "parties in interest" to those who are so affected. (*Sanders* v. *FCC*, 309 U.S. 470, 60 S.Ct. 693.) Except in two instances, the cases deal with protests made by station licensees against grants by the Commission of licenses for new stations or changing the privileges of other stations, on the ground that the new or changed grants affect the existing licensee-protester economically or electrically.

The cases decided since the amendment of section 309(c) in 1952 are:

Elm City Broadcasting Co. v. *U.S.*, 235 F. 2d 811, 1956
Granick & Cook v. *FCC*, 234 F. 2d 682, 1956
Clarksburg Publishing Co. v. *FCC*, 225 F. 2d 511, 1955
Federal Broadcasting System v. *FCC*, 225 F. 2d 560, 1955
Greenville Television Co. v. *FCC*, 221 F. 2d 870, 1955
Metropolitan Television Co. v. *U.S.*, 221 F. 2d 879, 1955
Camden Radio Inc. v. *FCC*, 220 F. 2d 191, 1955.

Each case has been decided on its own facts, with little or no reference to preceding cases; and they afford little guidance for future cases.

The *Granick* and *Clarksburg Publishing Company* cases dealt with protests made by non-broadcasters. In *Granick* the protester was the holder of an option for the assignment of a station and license. In *Clarksburg* the protest was made by a newspaper publishing company not engaged in broadcasting. In both cases decisions that the protesters were not parties in interest, were reversed by the Court of Appeals.

The purpose of statutes like section 309(c) is to encourage and procure intervention by private parties having more than a mere academic interest, on the theory that an adversary criticism will increase care by the administrative agency for the public interest. *Associated Industries* v. *Ickes*, 134 F. 2d 694, 702-705; *Scripps-Howard* v. *FCC*, 316 U.S. 4, 14, 1942.

In *FCC* v. *Sanders*, 309 U.S. 470, 477, decided before the 1952 amendment of the protest provision of

the Communications Act, this Court held that an intervenor in FCC proceedings could maintain an appeal under the appeals provisions of the Act, because it was probably the purpose of Congress in giving the appeal to encourage people having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission.

In *Associated Industries* v. *Ickes*, 134 F. 2d 694, CA 2, 1943, purchasers of coal were held to be affected by an order fixing the prices of coal, and that an association of the purchasers could maintain an appeal from the order as a "person aggrieved".

In *National Coal Assn.* v. *FPC*, 191 F. 2d 462, CA DC, 1951, employees of coal mining companies were held to be affected by the construction of a gas pipe line to supply fuel which might otherwise be purchased from their employers, and could maintain an appeal from the order authorizing the line.

Petitioner is more directly and substantially affected in this case than were the coal miners and purchasers in the coal and gas line cases.

It is evident that petitioner is no stranger or newcomer to, or without experience or knowledge of, the proceedings for selection of the St. Louis channel construction permit, of which the protest proceedings were the last stage, and is not the kind of protester which the Senate Report on the 1952 amendment of section 310 indicates was to be excluded, i.e., a party protesting with "no legitimate interest but solely with the purpose of delaying license grants which properly should be made." (Senate Report No. 44, 82nd Cong., 1st Sess., January 25, 1951.)

The payment of $400,000 to St. Louis Telecast and Broadcast House for purchase of their opposition in the Court of Appeals and Commission, thus giving up their opportunity to procure the permit themselves, demonstrates the substantial economic interest of petitioner, for they and petitioner were on a parity as unsuccessful applicants.

All of the other persons most immediately and directly affected by the selection of the permittee, and having any standing to protest, became beneficial participants in the private plan for selection, with the strongest motive to disregard and defeat any public interest which might be in conflict with their plan. It follows that if petitioner had no standing to protest, the cardinal requirement of the Communications Act for service of the public interest cannot be enforced in this case.

Clearly, there was substantial coincidence in the public interest and the private interest of petitioner, and a strong and practical motive on its part to subject these transactions to severe, intelligent and critical scrutiny, to expose any detriment to the public and itself. Moreover, the fact that the Commission was itself an actor in the transactions, in giving its consent for dismissal of the appeals against the original grant, thereby escaping a possible judicial decision critical of its action in making that grant, must have largely prevented any impartial consideration and decision by it of the protest. Petitioner's exertions in its own and the public interest might have offset in some degree the interest of the Commission to approve its own action, and would have been conducive to impartial and correct decisions.

PETITIONER WAS AGGRIEVED OR ADVERSELY AFFECTED BY THE APPROVAL OF THE TRANSACTIONS BY THE COMMISSION

The Communications Act provides that any person who is aggrieved or whose interests are adversely affected by action of the Commission, may appeal to the United States Court of Appeals for the District of Columbia. (Sections 402, 405).

The descriptions of those who may protest to the Commission and those who may appeal from action by the Commission, are different. To maintain a protest in the Commission one must be a "party in interest", whereas to maintain an appeal he must be one who is "aggrieved or whose interests are adversely affected" by the action of the Commission.

We submit that if petitioner was qualified as a party in interest under section 309 of the Act, it followed that by the dismissal of the protest it was aggrieved or adversely affected, and had standing to appeal.

REASONS FOR GRANTING CERTIORARI.

This case raises important questions of the functions, powers and procedure of the Communications Commission, which have been decided by the Court of Appeals. Petitioner submits that in addition to this and other reasons shown at large in this petition, a writ of certiorari should be granted for the following reasons.

The Commission has allowed private parties to change the selection made by it of the holders of television broadcasting privileges in one of the leading, important and most lucrative markets of the country, subject, if at all, only to a nominal scrutiny. It has

allowed the private parties to devise and put into effect their plan for redistribution of the television privileges in that market, according only to their own private interest.

The Court of Appeals held that the Commission may not subject this selection and plan of the private parties to the test of service to the public interest, convenience and necessity—at the instance of anyone. The decision is clearly wrong and revolutionary. As appeals in such cases go only to the Court of Appeals which has decided this case, the decision will be followed by the Commission and the Court as a controlling precedent in future cases, unless reversed by this Court or by Congress.

The Court of Appeals based the decision on a reluctant and dubious interpretation of the statute, which it has virtually stated should be changed by legislation. As to transfers of construction permits, the Act literally states that no permit shall be transferred except upon finding by the Commission that the public interest shall be served thereby. It would be hard, therefore, to frame new legislation to make the requirement to consider the public interest more definite and certain.

Before considering the need for new legislation to change the decision of the Court of Appeals, Congress may desire a decision by this Court or may desire that this Court shall have declined to review the case by denial of this petition.

Under a House Resolution a committee of Congress on February 5, 1958, was authorized to investigate the administration of the Communications Act by the Com-

mission, for determination of the need for legislation.[1] A subcommittee has been investigating the action of the Commission in this case, as one of about fourteen representative similar cases.[2]

The evidence so far taken by the subcommittee relative to the St. Louis channel 11 case, deals with (1) the CBS acquisition of KWK-TV, the transfer of the construction permit to 220 Television, and the approval thereof by the Commission; and (2) conferences with three of the Commissioners by an agent of CBS in the late fall of 1956, relative to the then pending decision for the original grant of the permit. The testimony (which at the date of this petition, September 1958, is incomplete), developed that William S. Paley and Frank Stanton, respectively chairman and president of CBS, and Tex McCrary, a friend and neighbor of Paley, late in the fall of 1956, and after the final argument before the Commission on the grant of the construction permit, together planned that McCrary should confer with members of the Commission, ostensibly as a newspaper reporter not associated with CBS, and ostensibly to procure information about the tardiness of the decision, about rumors of trial votes taken in the case, about the machinery for decision, and to learn "if there was anything the matter". Pursuant to the plan, McCrary conferred with Commissioners Doerfer, McConnaughey and Craven. Al-

[1] House Resolution 99, 85th Cong., 1st Sess., February 5, 1957; authorizing the Committee on Interstate and Foreign Commerce to make investigations.

[2] The Special Subcommittee on Legislative Oversight of the Committee on Interstate and Foreign Commerce; Report of Proceedings, May 15, 1958, Vol. 4, pp. 279, 327-347; June 2, 1958, Vol. 11, pp. 977-994.

though McCrary also tried to see Commissioner Lee, he was unable to do so.

The Commissioners interviewed by McCrary voted for a grant of the permit to CBS. To say the least; the action has the odor of an attempt to tamper with the Commission. Petitioner was without any knowledge of the attempt prior to June 2, 1958, when the public disclosure occurred in the committee hearings, long after the argument of this case in the Court of Appeals. As the same Commissioners voted for dismissal in December 1957 of the protest against the KWK acquisition and the transfer of the construction permit, petitioner may have had good ground for demanding that they take no part in that decision as well as in the decision on the original grant.

In *Massachusetts Bay Telecasters* v. *FCC*, —— F. 2d ——, decided July 31, 1958, not yet reported; 86 Wash. Law Reporter, 763; the Court of Appeals, being informed that testimony before the same committee showed that some of the parties had conferred with one of the Commissioners with reference to the case while it was under consideration by the Commission, remanded the case to the Commission for "hearing concerning the possibility that the award theretofore made might be void *ab initio*, or voidable . . ."

In *KWAT* v. *FCC* and *Eastern Airlines* v. *FCC*, Docket No. 13718 and No. 13725, United States Court of Appeals for the District of Columbia Circuit, the Commission filed a motion to remand the cases to it for consideration because of public charges developed before the same committee, that one of the Commissioners should have disqualified himself for similar conduct.

If this Court shall grant this petition, petitioner may thereafter be able to procure qualified and impartial Commissioners to pass on its protest.

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